

EVERTS (O.)

Expert Testimony
AND
Medical Experts.

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At the Hertford assizes (1699), in the trial of a man accused of murder, the prosecution—as stated by Mr. Justice Stephen, in his learned history of the criminal law of England—“collected a body of doctors to substantiate the proposition propounded by the crown.” “This case,” says the historian, “supplies nearly the earliest instance of a trial depending largely upon the evidence of experts.” It is further said, however, by the learned author—and the fact is significant if well considered—that “the defendant contradicted the evidence of the experts in a way that still shows any one who reads the case that he was fighting with a perfectly idle superstition.”

It is a fact conceded by English law-writers, and indicated by the asperity of medical writers toward them, that English judges have never held medical experts, especially in cases of insanity, in high estimation; while in this country the fact is patent to all interested observers that the testimony of medical experts exercises but little influence in determining verdicts, when not in harmony with popular sentiments or notions respecting the merits of any given case.

In view of such facts, may it not be well to consider, briefly, the following questions, namely: What is “Expert Testimony?” What are its essential elements of value? Who are medical experts?

Expert testimony differs from ordinary or non-professional testi-

mony in this respect, viz: Ordinary testimony consists of statements of facts as observed by the witnesses stating them, and opinions based upon such facts exclusively—the facts having been first fully stated. Expert testimony consists of opinions based upon facts as observed by the witness, or presented for his consideration hypothetically—having been observed by others—that he, by reason of peculiar knowledge, is alone supposed to be capable of interpreting.

This definition of expert testimony being accepted, it should not be difficult to determine the elements of value pertaining thereto. They are: first, scientific principles generalized from facts applicable and equal to the solution of the problem under consideration; and, second, capability on the part of the professed expert to make use of such principles in the solution of the problem given without bias or prevarication.

That scientific principles applicable and adequate to the solution of the problem given are essential to value in the constitution of expert testimony, may be inferred from the fact that without a knowledge of such principles the testimony of one witness of equal intelligence and opportunities of knowing would be equal in value to that of another. It is also apparent that such principles, to be applicable and adequate, must bear a definite relation to the facts presented for interpretation, and present features of consistency and accuracy that admit of no alternative construction. Were it not so—if, for example, the principles of the science of numbers were not definitely related to the facts of accounting, or not so consistent and accurate as to justify perfect confidence in the prediction that two and two, if added, will make four—it would require no argument to convince us that the testimony of an “expert” accountant would be of no especial value, the data of his calculations being unworthy of trust. The same might be said of the expert surveyor, engineer, or astronomer, the value of

whose interpretations of facts is derived from the infallible accuracy of the principles of the science of numbers. So, too, with the chemist (the value of his testimony as an expert depending, primarily, upon the accuracy of the principles of his science), if the relation of chemical phenomena to conditions of matter were not definite and uniform—given phenomena being inevitably sequential to given conditions of matter—the expert testimony of the chemist would be comparatively, if not entirely, worthless. Nor is argument needed to convince us that the testimony of the most capable expert, informed by principles of the most accurate science, might be vitiated or invalidated by dishonesty.

What, then, is the real value of medical expert testimony? And who should be considered as medical experts? Doctors of medicine are called upon to testify as experts in a range of cases involving questions of malpractice in medicine proper, surgery, and obstetrics, and in cases of suspected crime in which questions of cause of sudden or unhistoric death arise, and in cases of still greater difficulty and importance, in which questions of mental condition affecting the rights and privileges of citizens have to be adjudicated. Does that aggregation of knowledge, known as “medicine,” furnish the necessary principles for their qualifications as experts in all such cases? Are all persons engaged in the practice of medicine and popularly recognized as “doctors” informed by such principles as do pertain to the so-called “medical sciences?” These questions become especially pertinent in view of the fact that there is no recognized standard of educational attainment prerequisite to either the title or privileges of a doctor of medicine in this country—and the common law admits them all to testify as experts, subject only to the test of cross-examination as to qualifications by attorneys who may or may not be capable of exposing false pretensions.

When we consider seriously the natural capabilities and acquired knowledges of a large proportion of the multitude of men and women engaged in the practice of medicine in this country, and the questionable character of much that is taught by the numerous "schools," or sects, of medicine as science, these questions assume still greater importance, and the presumption of law that all are experts becomes preposterous. Even after eliminating from consideration all persons engaged in the practice of medicine who are not graduates of reputable, regular medical schools, the presumption would still be too violent for entertainment.

What, as a matter of fact, does such a presumption imply? Nothing less than an affirmation that the sciences constituting medicine, as taught in our schools, are informed by principles that are definite, comprehensive and trustworthy, beyond dissension, and that every one certified proficient in medicine by such schools is competent to make intelligent use of them in the formation of opinions as medical experts on all subjects.

But to get at the grain that may be in this chaff, let it be admitted that the instruction given in our schools is adequate to qualify medical witnesses to determine, as experts, whether or not an infant found dead was still-born; whether or not certain wounds, seen or described, were necessarily fatal; whether or not certain deformities following injuries were the results of malpractice; whether or not, as indicated by symptoms and post mortem appearances and chemical and microscopical examinations, in any given instance, death was effected by poison, etc.; still, the more important qualification of the medical expert to determine questions of mental manifestations and human actions, whether or not influenced by pathological conditions of brains or other organs, remains to be accounted for. What has medicine, in its widest range of instruction, to offer on this subject? After all,

how little! The most thorough-going anatomist is no wiser respecting the genesis of mind, or the relation of mental phenomena to material conditions, because of his dissections. The most learned and practical chemist knows no more of such matters, because of his analyses and syntheses of inorganic and organized bodies, than does the anatomist. Therapeutics throw no light of principles upon the subject. Surgery is dumb, and obstetrics blind respecting mental science. Physiology, that wonderful and growing science, that is to be to all other natural sciences what Aaron's rod was to the rods of the Egyptian magicians, has it not already furnished us with a new psychology, and is it not adequate to our present necessities? Let us see. If we depend upon science to furnish principles answering to our necessities, what are the requisites? It is requisite that such principles shall be accurate and indisputable. Does physiology, as now taught in our schools, supply the need?

Admit the fact that physiology has already swallowed up all the metaphysical psychologies, and that brains, with their appendages, the nerves, have come to be recognized as essential organs of mind, by which all mental operations are conducted; that when a man or any other animal, feels, perceives, remembers, imagines, reasons, wills, or acts, it is because of material capabilities, and his brain and nerves do something; that there is a relation, more or less definite, of mental capabilities and characteristics to size, form, and quality of brain structures, and an association of certain mental phenomena, with certain areas of brain substance; that modifications of mental capabilities and expressions, constituting all of the many degrees of capability, and peculiarities of expression, known as "idiocy," "imbecility," "mania," "melancholia" and "dementia," may be effected by arrest of cerebral development and modifications of brain activities, whether effecting constructive or destructive results and concomitant transmu-

tation of energy—admit all this as pertaining to present physiological knowledge—still the fact is apparent that we have not been supplied with such scientific principles as would alone qualify medical experts to testify as such in the jurisprudence of insanity.

Physiology, as taught in our schools, is, indeed, still in doubt respecting the relation of mind to body; whether consciousness is an inherent quality of matter, manifested, as all other qualities are, by motion, or an attribute of a supernatural, indwelling spiritual being, not subject to sensuous observation, but inspiring or instigating all bodily activities; in doubt whether mental manifestations are concomitants of brain activities instigated by an immaterial ego, or the inevitable sequentials of ever-changing conditions of brain-substance influenced by environments.

Nor can physiology tell us, in accordance with any theory, just what the brain or body or spirit does when a man feels, thinks, or acts; nor just what instigates his activities, determines his movements, and differentiates his capabilities. So that, even with these doubts of physiology dispelled, and the subject of man's creation and constitution forever withdrawn from the shadows of superstition and the overawing presence of the supernatural, and the science of psychology arranged in line with all other natural sciences, in accordance with a monistic theory of the universe—of which men are inseparable particles—we should still be unable to predict with certainty the phenomenal sequences of all given conditions of body or brain precedent, or to infer with precision conditions of body or brain by any given mental manifestations, unaided by other than physiological information.

Why, then, should doctors of medicine be regarded as experts in the jurisprudence of insanity more than other persons of equal general intelligence? Is it not because of the fact that the official rela-

tion of the doctor of medicine to the afflicted is now, as it ever has been, the most intricate, intimate and privileged known or tolerated by civilized or savage society, and because his movements as diagnostician and dispenser of drugs with healing virtues are to the uninitiated within the same shadow of superstition that obscures their vision when trying to comprehend the mystery of thought, whether sane or insane? Hence his greater opportunities of observation and study of the natural history of men and their disorders, and the endless variations of mental phenomena as related to material, observable facts. Must not any claim of qualification as an expert in the jurisprudence of insanity, therefore, be based upon special, long-continued, intelligent observation of the insane, and careful, comprehensive studies of the natural history of insanity, rather than special knowledges derived from medical authorities, however advantageous such knowledges may be to the observer and student? And must not the value of the testimony of experts so qualified correspond to the natural capabilities, advantages of education and experience, and general interest in the subject of the persons testifying?

In these days, therefore, of specialties in medicine, and the habitual commitment of the insane to hospitals or asylums for treatment or maintenance at the earliest practicable moment, but few general practitioners of medicine have either the opportunity or disposition to so qualify themselves as experts in this branch of medical jurisprudence; and but few—to the credit of the profession, be it said—voluntarily appear in court pretending to be such.

Of the second essential element of value mentioned, the integrity and freedom from bias of the expert witness, but little need be said. Perverted knowledge is more dangerous than conceited ignorance. The natural tendency of experts, however, is to invalidate their opinions more or less by the admission of color derived, imperceptibly, it

may be, from the interest taken in behalf of the parties employing them. Instigated, also, by professional pride, experts, like detectives, are more zealous in finding what they are supposed to be peculiarly qualified to find than otherwise, a fact that in this country has been, so far as expert testimony has influenced courts or juries in any way, advantageous to defendants in cases of criminal prosecution, and to plaintiffs in cases of contested wills.

These are natural tendencies that experienced experts are capable of overcoming when recognized, but should not be overlooked in estimating the value of expert testimony.

Of the mercenary and venal expert nothing need be said. If such there be, they have no proper place in a profession so proverbially unselfish as that of medicine.

